Labor Ready, Inc. *and* Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL–CIO. Case 9–CA–34950

March 23, 2000

ORDER DENYING MOTION

BY MEMBERS FOX, HURTGEN, AND BRAME

On March 26, 1999, the National Labor Relations Board issued a Decision and Order[1] in this case finding that the Respondent violated the Act by, inter alia, refusing to continue to refer Donald Huff for employment and by attempting to prevent him from circulating a petition. On April 26, 1999, the Respondent filed a motion for reconsideration, for reopening the record and for rehearing, or, in the alternative, for a stay. The General Counsel filed a memorandum in opposition to the Respondent's motion.

The Board has delegated its authority in this proceeding to the same three-member panel that issued the underlying Decision and Order.

The Respondent contends that newly discovered union logs establish that Huff knew that the Union would be unable to organize the Respondent but continued to purport to do so anyway in order to induce the Respondent to commit unfair labor practices, to disrupt its business, and to force the Respondent to cease doing construction work.[2] The Respondent maintains that Huff was therefore not a bona fide applicant and was not entitled to the protection of the Act. The Respondent further argues that Huff lied at the instant hearing about his knowledge of picketing planned at one of the jobsites to which the Respondent referred applicants. Based on Huff's untruthful testimony, the Respondent argues that the judge's credibility resolutions should be disregarded.

The Respondent further contends that it should be permitted to introduce (in addition to evidence pertaining to the logs) further evidence concerning what constitute "work areas" at its facilities. The Respondent contends that this latter evidence may be necessary to avoid conflicting decisions regarding the validity of its no-solicitation policy. In the alternative, the Respondent requests that the instant proceeding be stayed pending resolution of Cases 9–CA–36223 and 9–CA–36395, in which, the Respondent states, more evidence was adduced on the "work area" issue than was adduced in the instant proceeding.

The General Counsel argues that the Respondent's proffered evidence is not "newly discovered" within the meaning of Section 102.48(d)(1) of the Board's Rules and Regulations. The General Counsel further contends that the evidence would not, if admitted, show that Huff was not a bona fide applicant. The General Counsel further maintains that, to allow the Respondent to reopen the record because of arguments based on evidence it obtained in a later hearing, but which was available to it at the time of the instant hearing, would set a dangerous precedent.

For the following reasons, we reject the Respondent's motion.

Section 102.48(d)(1) of the Board's Rules and Regulations permits a party in "extraordinary circumstances" to move for "reconsideration, rehearing, or reopening of the record after a Board decision or order" issues. Although the Respondent seeks, in the alternative, all of these actions, the gist of its motion is that the Board should reopen the record in this case to admit newly discovered and previously unavailable evidence that was introduced in a subsequent unfair labor practice proceeding. Initially, however, we note that because much of the evidence the Respondent now seeks to introduce—union logs—was in existence prior to the January 1998 hearing in this case, it is not "previously unavailable.'' Thus, some of the logs date back to 1996. Nor does it appear that these records are "newly discovered'' within the meaning of Section 102.48(d)(1). "Newly discovered evidence is evidence that was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Seder Foods Corp*., 286 NLRB 215, 216 (1987). Here, however, Thomas Williams, the union president who maintained the logs, was present at the instant hearing, where he represented the Charging Party. The Respondent could have subpoenaed the records from Williams at that time. See also *Fitel/Lucent Technologies*, 326 NLRB 46 (1998) (motion to introduce evidence as newly discovered must show that movant acted with reasonable diligence to uncover and introduce evidence). Further, to the extent that some of the logs the Respondent seeks to introduce cover periods after the instant hearing, they do not fall within the category of newly discovered evidence. *Machinists Lodge 91 (United Technologies*), 298 NLRB 325 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991).

We also note that under Section 102.48(d)(1) and (2) "evidence which has become available only since the close of the hearing . . . shall be filed promptly on discovery of such evidence." Here, the Respondent subpoenaed the logs at a hearing on January 14, 1999, but did not file its motion until April 26, 1999. We find that the Respondent did not file its motion "promptly" in accord with Section 102.48(d)(2).

The Respondent's contention as to the possibility of conflicting decisions regarding its "work area" is speculative and, in any event, such a possibility can be appropriately dealt with if and when it materializes. Further, it would seem that the Respondent could have adduced

[1] 327 NLRB 1055.

[2] The Respondent subpoenaed the logs in a later proceeding involving the same parties, Cases 9–CA–36223 and 9–CA–36395, heard January 14, 1999.

more evidence on this point, had it chosen to so, at the instant hearing.

Finally, insofar as the Respondent's motion seeks to reopen the record to attack the judge's credibility determinations, we deny it. See *P&T Metals, Inc.*, 316 NLRB 1189 (1995).

IT IS HEREBY ORDERED that the Respondent's motion for reconsideration, for reopening the record and for rehearing, or, in the alternative, for a stay is denied.